

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70
December 20, 2001

Witness Responsible: Frank Chiaino, Chief Operating Officer of Fibertech

SELP 3-1 Please refer to page 3, lines 6-9, page 7, lines 7-13, page 9, line 8, page 11, lines 10-12, and page 12, line 1 of Mr. Lundquist's Direct Testimony.

(a) Please provide each instance, transaction and contract where Fibertech provides the electronic equipment (i.e., electric-optic transducers and associated equipment) necessary to activate (light) the dark fiber as part of its services to and agreements with its customers.

(b) If Fibertech does not provide such electronic equipment as described in Information Request SELP 3-1(a), please state so.

RESPONSE: (a) Fibertech does not currently provide electronic equipment to activate the dark fiber it provides to customers; the customers supply this equipment.

(b) See response to (a).

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

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December 20, 2001

Witness Responsible: Frank Chiaino, Chief Operating Officer of Fibertech

SELP 3-2 Please refer to the testimony set forth above in SELP 3-1.

(a) Provide each instance, transaction and contract where Fibertech, itself, actually activates (lights) the dark fiber as part of its services to and agreements with its customers.

(b) If Fibertech does not so activate (light) the dark fiber, as described in Information Request SELP 3-2(a), please state so.

RESPONSE: Fibertech objects to this request as cumulative and repetitive, and refers to its response to SELP 3-1.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70

December 20, 2001

Witness Responsible: Frank Chiaino, Chief Operating Officer of Fibertech

SELF 3-3 (a) Referring to the testimony set forth in SELP 3-1, please provide each instance, transaction and contract where Fibertech, itself, is directly transmitting intelligence by television, telephone or electricity as part of its services and agreements with its customers.

(b) If Fibertech does not so transmit intelligence as described in Information Request SELP 3-3(a), please state so.

RESPONSE: (a) Fibertech objects to this request as vague and ambiguous because "directly transmitting intelligence" is not defined. Notwithstanding this objection, Fibertech responds as follows: In each instance in which it provides service, Fibertech transmits intelligence by providing fiber optic cables capable for the transmission of intelligence by telephone.

(b) See response to (a).

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70
December 20, 2001

Witness Responsible: Frank Chiaino, Chief Operating Officer of Fibertech

SELP 3-4 (a) Referring to the testimony set forth in SELP 3-1, please provide each instance, transaction and contract where Fibertech is actually carrying any telecommunications signals as part of its services to and agreements with its customers.

(b) If Fibertech does not so carry telecommunications signals as described in Information Request SELP 3-4(a), please state so.

RESPONSE: Fibertech objects to this request as cumulative and repetitive, and incorporates its response to SELP 3-3.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70
December 20, 2001

Witness Responsible: Scott C. Lundquist, Vice President of Economics and Technology,
Inc.

- SELP 3-5 (a) Referring to Mr. Lundquist's testimony on pages 10 and 12, is SELP
an ILEC?
- (b) Please provide the basis of the answer provided in response to SELP 3-
5(a).

RESPONSE: (a) Fibertech objects to this request insofar as it calls for a legal
conclusion. Subject to this objectionm the answer is no.

(b) So far as Fibertech or Mr. Lundquist is aware, SELP does not provide
exchange telephone service, although it apparently does provide long
distance service. See SELP Response to Fibertech 2-5. In addition, SELP
does not appear on the Massachusetts DTE's list of authorized in-state
telecommunications providers, as either an Incumbent Local Exchange
Carrier (ILEC) or a Competitive Local Exchange Carrier (CLEC). See
<http://db.state.ma.us/dpu/qorders/frmTelecomList.asp>, accessed 11/28/01. See
also SELP Response to Fibertech Information Request 1-4.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70
December 20, 2001

Witness Responsible: Scott C. Lundquist, Vice President of Economics and Technology,
Inc.

- SELP 3-6 (a) Referring to Mr. Lundquist's direct testimony on page 22, is SELP a CLEC?
- (b) Please provide the basis of the answer provided in response to SELP 3-6(a).

RESPONSE: (a) No.

(b) See response to SELP 3-5 (b).

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70

December 20, 2001

Witness Responsible: Scott C. Lundquist, Vice President of Economics and Technology,
Inc.

SELP 3-7 (a) In reference to Mr. Lundquist's direct testimony on page 16, lines 14-16, pages 17, lines 1-2, please provide copies of the pole attachment statutes and regulations in New York and Connecticut.

(b) Please provide a comparison of the key elements of the pole attachment statutes in New York and Connecticut and the pole attachment statute in Massachusetts.

RESPONSE: (a) Fibertech objects on the grounds that this request is not reasonably calculated to provide admissible evidence. In addition, Fibertech objects to producing copies of documents that are equally available to SELP as to Fibertech.

(b) Fibertech objects on the grounds that this request is overbroad and not reasonably calculated to provide admissible evidence. Fibertech also objects to this request as calling for a legal conclusion, and states that the statutes speaks for themselves. Notwithstanding that objection, Fibertech states that neither Mr. Lundquist nor Fibertech has prepared or is in possession of any such comparison.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70
December 20, 2001

Witness Responsible: Scott C. Lundquist, Vice President of Economics and Technology,
Inc.

- SELP 3-8 (a) Referring to Mr. Lundquist's direct testimony on page 16, please
provide the pole attachment agreements that NEESCOM has entered into
in Massachusetts.
- (b) Please provide the pole attachment rates that NEESCOM is paying for
its pole attachments in Massachusetts.
- RESPONSE: (a) Such agreements are not within the possession, custody, or control of
Fibertech or Mr. Lundquist.
- (b) See response to subpart (a).

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70
December 20, 2001

Witness Responsible: Scott C. Lundquist, Vice President of Economics and Technology,
Inc.

SELP 3-9 Please refer to page 4 of Mr. Lundquist's testimony.

(a) Provide all DTE and FCC documents "recognizing" that dark fiber constitutes a "new communication service."

(b) With respect to the documents provided in response to SELP 3-9(a), please explain how any of these documents are relevant to a pole attachment dispute under G.L. c. 166, § 25A?

RESPONSE: (a) Fibertech objects to this question as unintelligible to the extent that it refers to page 4 of Mr. Lundquist's testimony, because page 4 does not contain the quoted phrases. Fibertech also objects to providing public documents equally available to SELP as to Fibertech. Fibertech further objects to providing each and every such document as overbroad and unreasonably burdensome in that it calls for Fibertech to perform legal research beyond that underlying documents already submitted. Notwithstanding those objections, Fibertech responds as follows:

In Mr. Lundquist's summary of his prefiled testimony, he states the following (page 3, lines 14-16): "Regulators, including the DTE and FCC, have responded to this development, by recognizing that dark fiber constitutes a new communications service, and requiring the incumbent LECs to offer dark fiber on an unbundled basis to their competitors." Mr. Lundquist more fully explains the actions of the DTE and the FCC in this area at pages 8-13 of his testimony. As described therein, the FCC determined that the BOCs' dark fiber offerings were communications services (*i.e.*, "wire communications under the *Communications Act of 1934*) in its 1993 *Dark Fiber Tariffs Order*, and the DTE's April 14, 2000 decision in Docket 98-116 agreed with the FCC's conclusion in the June 24, 1997, *Non-Accounting Safeguards Order* that the leasing of dark fiber

extending across LATA boundaries would constitute an interLATA communications service. Citations to each of these orders are supplied in footnotes 3, 8 and 9 to Mr. Lundquist's testimony. These documents are available for inspection at the offices of Economics and Technology, Inc., and may be found at www.fcc.gov and www.dte.state.ma.

(b) Fibertech objects to this request as calling for a legal conclusion. Subject to this objection, the FCC and DTE decisions cited in Fibertech's response to SELP 3-9(a) are relevant to establish that dark fiber is a form of telecommunications service and that pole attachments for dark fiber effectuate the purposes of the Telecommunications Act of 1996 and the policies of the DTE to advance competition in telecommunications.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70

December 20, 2001

Witness Responsible: Scott C. Lundquist, Vice President of Economics and Technology,
Inc.

SELP 3-10 Please refer to pages 8 through 10 of Mr. Lundquist's testimony.

(a) Provide copies of all DTE and FCC orders that recognize dark fiber as a "telecommunications service" under 47 U.S.C. § 153(46).

(b) What is the difference between a "communication" (i.e., "wire communications") service and a "telecommunications" service under FCC precedent?

RESPONSE: (a) Fibertech objects to producing documents that are equally available to SELP as to Fibertech. Fibertech further objects to providing each and every such document as overbroad and unreasonably burdensome in that it calls for Fibertech to perform legal research beyond the underlying documents already submitted. Subject to these objections, Fibertech responds as follows:

See Fibertech's responses to SELP 3-9(a) and SELP's second question labeled "SELP 3-10", part (b).

(b) Fibertech objects to this question to the extent that it calls for a legal conclusion.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70

December 20, 2001

Witness Responsible: Scott C. Lundquist, Vice President of Economics and Technology,
Inc.

SELP 3-10 Please refer to page 9 of Mr. Lundquist's testimony.

(a) Has the FCC determined, post-"1993 Dark Fiber Tariffs Order," that provision of dark fiber service is a "telecommunications service" in its own right under 47 U.S.C. § 153(46)?

(b) What impact did the Telecommunications Act of 1996 have on the FCC's finding in 1993 that dark fiber constitutes a "wire communication?"

(c) Did the FCC's "1997 Non-Accounting Safeguards Order" address the FCC's position on whether the provision of dark fiber is a "telecommunications service" under the Telecommunications Act of 1996?

RESPONSE: (a) Fibertech objects to this question to the extent that it calls for a legal conclusion. Subject to this objection, Fibertech responds as follows: Yes, that is Mr. Lundquist's understanding. See the FCC's Non-Accounting Safeguards Order referenced in Fibertech's Response to SELP 3-9(a). At para. 54, footnote 110 therein, the FCC observed that dark fiber "is a 'wire communication', *i.e.*, a communication service." The FCC expressly relied upon that finding to support its conclusion in para. 54 that "the leasing of capacity on an in-region interLATA network is plainly an in-region inter-LATA service," where "interLATA service" is defined as a form of telecommunications service (para. 54, footnote 110). Thus, the FCC apparently saw no need to explicitly update its prior finding regarding dark fiber to reflect the Telecommunications Act's change in certain statutory definitions (*i.e.*, the replacement of the term "communication service" with "telecommunications service"), and instead simply applied that finding under a presumption that "communications service" and "telecommunications service" were synonymous.

(b) Fibertech objects to this question to the extent that it calls for a legal conclusion. Subject to this objection, Fibertech responds as follows:

While not offering a legal opinion, Mr. Lundquist believes that the FCC continued to view dark fiber offerings as a communications service after the passage of the Telecommunications Act of 1996. Mr. Lundquist's reading of paragraph 54 and footnote 110 of the FCC's June 24, 1997 Non-Accounting Safeguards Order is that the Act changed certain statutory definitions (*i.e.*, the replacement of the term "communications service" with "telecommunications service"), but it did not change the substance of the FCC's conclusion. See Fibertech's response to SELP 3-10(a) above.

(c) Fibertech objects to this request to the extent that it calls for a legal conclusion. Notwithstanding this objection, Fibertech responds as follows: Yes. See Fibertech's response to SELP 3-10(a) above.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70

December 20, 2001

Witness Responsible: Scott C. Lundquist, Vice President of Economics and Technology,
Inc.

SELP 3-11 Please refer to page 10 of Mr. Lundquist's testimony. How is the Global
NAPS case referred to relevant to a pole attachment dispute under G.L. c.
166, § 25A?

RESPONSE: Please refer to SELP's response to Fibertech 1- 20.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70
December 20, 2001

Witness Responsible: Scott C. Lundquist, Vice President of Economics and Technology,
Inc.

SELP 3-12 Please refer to page 11 of Mr. Lundquist's testimony.

- (a) Did the FCC in its "1999 UNE Remand Order" find that dark fiber constituted a "telecommunications" service under 47 U.S.C. § 153(46)?
- (b) Does the fact that something is a "UNE" necessarily mean that same thing is also a "telecommunications service" under 47 U.S.C. § 153(46)?

RESPONSE: (a) Fibertech objects to the extent this question calls for a legal conclusion. No, as the FCC did not address the issue whether dark fiber constituted a "telecommunications" service under 47 U.S.C. § 153(46) in that order. However, as explained in pages 12-13 of Mr. Lundquist's testimony, the FCC did conclude in the 1999 UNE Remand Order that ILEC dark fiber met the statutory definition of a "network element" given that "it is physically connected to the incumbent's network and is easily called into service" (para. 328).

(b) Fibertech objects to the extent this question calls for a legal conclusion. Subject to this objection, Fibertech responds as follows:

Not necessarily. Some UNEs, such as dark fiber or local loops, constitute "telecommunications services," and others, such as operations support systems, do not.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70

December 20, 2001

Witness Responsible: Scott C. Lundquist, Vice President of Economics and Technology,
Inc.

SELP 3-13 Please refer to page 12 of Mr. Lundquist's testimony.

(a) If something is "used in the provision of telecommunications" under 47 U.S.C. § 153(29), does that necessarily mean that it is also a "telecommunications service" in its own right under 47 U.S.C. § 153(46)?

(b) If Mr. Lundquist's answer to SELP 3-13(a) is yes, please provide all documents that support this position.

RESPONSE: (a) Fibertech objects to the extent this question calls for a legal conclusion. Subject to this objection, Fibertech responds as follows:

Not necessarily. However, some things which meet the definition in 47 U.S.C. § 159 (29) for "network elements" may be offered as a "telecommunications service". For example, ILECs offer to the public (for a fee) unbundled local loops (which the FCC has determined to be a "network element") for the transmission of information between two points, so that, in Mr. Lundquist's view, unbundled local loops also represent a "telecommunications service." Dark fiber offerings can similarly qualify as a "network element" and a "telecommunications service."

(b) N/A. Response to subpart (a) is No.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70

December 20, 2001

Witness Responsible: Scott C. Lundquist, Vice President of Economics and Technology,
Inc.

SELP 3-14 Please refer to page 20 of Mr. Lundquist's testimony.

(a) Are the Choice One Master Facilities and other Agreements that Fibertech has with customers privately-negotiated contracts?

(b) If the answer to SELP 3-14(a) is yes, please describe whether the provision of dark fiber under such arrangements constitutes the offering of dark fiber on a "common carrier" basis.

RESPONSE: (a) Fibertech objects to producing such information on the grounds that is irrelevant to the issues in dispute and that this information is competitively sensitive and therefore confidential. In this light, the burden of seeking protective treatment or obtaining authorization from Fibertech's customers to produce outweighs any marginal probative value of this information. Fibertech further objects to producing such information of customers that do not do business in Massachusetts.

(b) See response to (a). Fibertech further objects to the extent this question calls for a legal conclusion.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70

December 20, 2001

Witness Responsible: Frank Chiaino, Chief Operating Officer of Fibertech

SELP 3-15 Referring to Mr. Chiaino's direct testimony at pages 4 and 6, please
provide all agreements that Fibertech has with Verizon.

RESPONSE: Fibertech has provided all pole attachment agreements with Verizon.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70
December 20, 2001

Witness Responsible: Frank Chiaino, Chief Operating Officer of Fibertech

SELP 3-16 Referring to Mr. Chiaino's direct testimony at page 6, please provide all responses, documents and communications that Fibertech has received from Massachusetts municipal light plants and Massachusetts cities and towns with respect to Fibertech's requests for pole attachments and rights-of-way grants of approval.

RESPONSE: Fibertech objects to this request as irrelevant and not calculated to lead to discovery of admissible evidence. Notwithstanding this objection, Fibertech has produced all pole attachment and conduit agreements in Massachusetts.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70
December 20, 2001

Witness Responsible: Frank Chiaino, Chief Operating Officer of Fibertech

SELP 3-17 Referring to Mr. Chiaino's direct testimony at page 6 please provide all communications within Fibertech concerning Fibertech becoming and being a CLEC.

RESPONSE: Fibertech objects to this request pursuant to the attorney-client and work product privileges. Subject to protective treatment, Fibertech will produce non-privileged documents.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70
December 20, 2001

Witness Responsible: Frank Chiaino, Chief Operating Officer of Fibertech

SELP 3-18 (a) In reference to Fibertech's response to SELP 1-10, please explain why lighting Fibertech's optic cable would result in additional services not covered by Fibertech's Massachusetts tariffs.

(b) Please set forth what services are covered by Fibertech's Massachusetts's tariffs, providing the specific tariff sections and pages where such services are covered.

RESPONSE: (a) Fibertech's current model tariff does not cover wholesale services.

(b) The tariffs speak for themselves.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70
December 20, 2001

Witness Responsible: Frank Chiaino, Chief Operating Officer of Fibertech

SELP 3-19 (a) In reference to Fibertech's response to SELP 1-10 does Fibertech have agreements with providers of hardware or software used to activate (light) it dark fiber?

(b) If the answer to SELP 3-19 (a) is yes, please provide these agreements.

RESPONSE: (a) No.

(b) See response to SELP 3-19 (a).

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

THIRD SET OF INFORMATION REQUESTS OF SHREWSBURY'S ELECTRIC
LIGHT PLANT TO FIBER TECHNOLOGIES NETWORKS, L.L.C.

D.T.E. 01-70
December 20, 2001

Witness Responsible: Frank Chiaino, Chief Operating Officer of Fibertech

SELP 3-20 (a) Referring to SELP's response to SELP 1-19, is Fibertech providing local exchange voice data service?

(b) If the answer to SELP 3-20 (a) is yes, please provide the agreements with Fibertech's customers where such services are being provided.

RESPONSE: (a) Fibertech objects to this request as ambiguous and vague, in that "local exchange voice data service" is unintelligible. Subject to this objection, Fibertech assumes the request is meant to refer to voice "or" data service, to which the answer is 'yes', where Fibertech is currently offering service. The answer is 'no' in the Shrewsbury area, because Fibertech is being prevented from doing so.

(b) Fibertech objects to producing such agreements on the grounds that they are irrelevant to the issues in dispute and that the agreements are competitively sensitive and therefore confidential. In this light, the burden of seeking protective treatment or obtaining authorization from Fibertech's customers to produce outweighs any marginal probative value of these agreements. Fibertech further objects to producing such information of customers that do not do business in Massachusetts.